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IN THE

Supreme Court of the United States

October Term, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

v.

EDWARD S. SILVER, District Attorney,
Kings County, State of New York,

Respondent.

BRIEF OF THE NEW YORK STATE ASSOCIATION OF TRIAL LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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The Interest of the *Amicus Curiae*

The New York State Association of Trial Lawyers is a self-governing bar association with a membership of 3,500 New York lawyers who practice particularly in personal injury law. It is the New York affiliate of the American Trial Lawyers Association, successor to the National Association of Claimants' Compensation Attorneys with a national membership of some 17,000 members.

The *amicus curiae* believes that the decision below raises serious questions as to constitutional limitations upon the conduct of judicial inquiries into the professional conduct of attorneys. These questions, we submit, go to the heart of the right to engage in the practice of law which must concern the bar and the public and require their resolution by this Court in this case.

We take no position upon the guilt or innocence of the petitioner with respect to the charges upon which he was

disbarred by the Court below. The larger question as to the denial of due process in the inquiry which led to the disbarment is our primary concern as a bar association. We agree whole-heartedly with this Court's observation in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 273:

> "A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms to obtain that goal."

Statement of Facts

Petitioner was subpoenaed in November, 1957, to appear before a judicial inquiry into the conduct of attorneys ordered by the Appellate Division, Second Judical Department of New York. The subpoena required him to produce at the inquiry all of his personal and business records, bank books, check stubs, tax returns and cancelled checks covering the years 1953 through 1956 (S.R. 118-129).* The subpoena was complied with and the petitioner testified on two occasions before the inquiry in May and June, 1958 (S.R. 33, 84). Subsequently, charges of misconduct were filed against the petitioner based largely upon the records subpoenaed as above noted. A hearing was held on these charges in 1960. In the three year interval between the issuance of the subpoena and the hearing, repeated efforts by the petitioner to have his books and records returned to him so that he might prepare his defense to the charges against him met with no success. He was compelled to meet the charges without his records and despite his objections on the ground that the seizure and detention of the records violated his constitutional guarantees against illegal and unreasonable search and seizure and a denial of due process (S.R. 75-83). The Appellate Division nevertheless ordered his disbarment and the New York Court of Appeals affirmed without opinion (15 App. Div. 2d, 558, App. B-70).

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* References are to the Appendices attached to the petition for certiorari.

Argument

The question that emerges with striking urgency from the facts is whether petitioner was denied the fair treatment required by the due process clause of the Constitution and was subjected to an unlawful search and seizure in violation of the Fourth and Fifth Amendments.

It seems clear enough that compulsory production of private papers by subpoena is a search and seizure within recognized constitutional definitions. *Boyd* v. *United States,* 116 U. S. 616. Nor are broad and roving general searches for evidence looked upon beningnly by this Court. See, for instance, *Marron* v. *United States,* 275 U. S. 1922. A broader and more roving search than the subpoenaed bank and personal records of the petitioner here can hardly be imagined. Moreover, the compulsion to deliver his records pursuant to the subpoena in view of this Court's affirmance of the "duty to co-operate" with a judicial inquiry in *Cohen* v. *Hurley,* 366 U. S. 17, left him no choice in the matter and can certainly not be deemed a waiver of the petitioner's rights.

Most significant of all, in the conduct of the judicial inquiry here, is the refusal of the inquiry to return the petitioner's books and records to him during the entire three year period between the subpoena and the hearing. This refusal and the consequent necessity for petitioner to defend himself without the opportunity to see his own records constitutes a denial of due process under the Fourteenth Amendment which in our view requires a reversal of the judgment below. It is hardly necessary to point out that due process requires the opportunity to prepare a defense to charges whether they be criminal in nature or in administrative proceedings. *In re Oliver,* 333 U. S. 257; *Greene* v. *McElroy,* 360 U. S. 474.

We submit that the profession of the law is too valuable to be placed in jeopardy by such arbitrary procedures.

There are few professions and no occupations in which the consequences of occupational expulsion are so devastating. Public disgrace, loss of livelihood and expulsion from the profession which has constituted his life's work are the disbarred lawyer's fate. See *Bradley* v. *Fisher*, 13 Wall (80 U. S.) 335, 355. Even the most routine of work, tangentially connected with legal practice, is forbidden to the disbarred lawyer. Drinker, *Legal Ethics* (1953), pp. 51 *et seq.*

This is not to question the desirability of the highest standards of behavior. There is nothing inconsistent in requiring both high standards of the professional man and strict proof and fair procedures of his prosecutors and judges. Cf. *Ex parte Secombe*, 19 How. (60 U. S.) 9, 13; *Ex parte Garland*, 4 Wall (71 U. S.) 333, 379.

What cries out in this proceeding is the vulnerability of lawyers to the life and death power of a judicial inquiry which acts in disregard of their fundamental rights. Here surely is a denial of the equal protection to which lawyers too are entitled under the Fourteenth Amendment. This is a clear instance of the failure to give the "protection of the individual against arbitrary action" which Mr. Justice Cardozo called the very essence of due process. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302; *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 559.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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